3/12/2010
REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Delivered on 03 December 2010

CASE NO: A195/10

In the matter between:

ERNEST JOHANNES BOTES **APPELLANT**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.
03 Dec 2010
DATE SIGNATURE

And

THE STATE **RESPONDENT**

JUDGMENT

MAVUNDLA J;

[1] The appellant, who was 17 years old at the time of commission of the murder, was on 11 December 2003 convicted together with his co-accused and sentenced by Monare AJ to 15 years imprisonment on 17 May 2004. Leave to appeal was refused.

[2] The Supreme Court of Appeal on 13 June 2008 granted leave to appeal to the Full Bench of this Court against the sentence imposed and ordered that:

The issue on which leave to appeal is granted include the following:

2.1. Were the principle set forth in S v Pietersen 2001 (1) SACR 16 (SCA) and S v Ntaka (2008) ZASCA applied properly or at all?

2.2. In the light of the decision in S v Salzwedel[1] was the sentence excessive?

2.3. Did the trial court err in imposing the same sentence on the appellant as on accused No 2 given the extent of the difference in their participation in the crime?

2.4. Accused 3 who had absconded before sentence proceedings in 2004 had been apprehended and also sentenced to 15 years imprisonment in 2010.

1999 2 SACR 586 (SCA).

[3] In dealing with this appeal this Court must be guided by the recognition firstly that sentencing is a matter of the discretion of the trial court; secondly that the court of appeal has limited discretion to interfere with the discretionary sentencing judgment. I deem it appropriate to cite in full the relevant judgments dealing with the two principles. In *S v Toms; S v Bruce*[2] the Appellate Court stated that: "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (*cf R v Mapumulo and Others* 1920 AD 56 at 57). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our Law (*S v Rabie* 1975 (4) SA 855 (A) at 861D; *S v Scheepers* 1977 (2) SA 154 (A) at 158F-G)."

[2] 1990 (2) SA 802 (AD) at 806H.

[4] The Appeal Court can only interfere with the sentence if the discretion of the court imposing sentence was not judicially exercised and was vitiated by an irregularity or misdirection or is so severe that no reasonable court could have imposed such sentence. The Appeal Court will interfere if the sentence induces a sense of shock and is grossly excessive to what sentence the Appeal Court would have imposed; *vide S v De Jager and Another*[3]; The court of appeal cannot substitute its own sentence for that of the trial court for that would be usurping the functions of the trial court; *vide* ***S*** *v Blignaut* 2008 (1) SACR 78 (SCA) at 81i-82b para [4].

[5] The appellant and his co-accused were duly represented during the trial. They pleaded not guilty and exercised their right of silence. The Court rejected the denial version of the appellant and his co-accused of their guilt. The Trial Court accepted the State's version and convicted them as charged.

[3] 1965 (2) SA 6161 (A) at 628FIN-629B.

[6] The backdrop to the conviction and sentencing of the appellant was that on the 15 February 2001 then 17 years old he together with accused 2 (then 15 years old) and accused 3 (then 19 years old) came across Daniel Pitso Lenokwane (the deceased) who was inebriated. Accused 2 in racist's terms, including the abhorrent, demeaning, offensive and hurtful "K" word suggested that the deceased be assaulted. They all assaulted the deceased by kicking and punching him with fists simply because of the colour of his skin and was in their so called white territory. The deceased was left lying on the pavement where he perished as the result of the injuries emanating from the assault. The trial Court considered the evidence before it and concluded that the appellant and his *socio in crime* committed the crime in pursuit of a common purpose and found them guilty of the murder on *dolus eventualis.*

[7] The cause of death is recorded in the post mortem report prepared by Dr. HS Wentzel. The injuries sustained by the

deceased were bruises, lever rapture, cranial fracture and bleeding. The cause of death is head injuries and brain haemorrhage.

[8] In sentencing the appellant the trial court had regard, *inter alia*, to the following factors:

(a) The youthfulness of the appellant and his co-accused. The appellant was 17 years at the time of the commission of the offence. Accused 2 was15 years old and accused 3 was 19 years old.

(b) The trial Court was conscious and mindful of the Constitutional provisions dealing with the sentencing of a youth who committed offences before they reached the age of 18 years. It reminded itself that where possible the convicted youth must be kept out of prison.

(c) The trial Court took into account and in favour of the appellant that they had taken liquor, drugs and dagga at the time of the commission of the offence.

(d) The trial court had also caused a probation report to be prepared and same was prepared by Ms Bruwer.

[9] *In casu* the Correctional Supervision probation officer recommended that the appellant should be sentenced to correctional supervision in terms of section 276. This report also recommended that the appellant should be placed under correctional supervision for 16 months. However Bruwer's report stated that the appellant was presently employed as a welder at Provido in Lichtenberg and earns an amount of R400.00 since January 2004. The appellant stays at a caravan park at his work place. After they have completed the contract they are working on, they move to another site and set up their caravan park there. Bruwer held the view that because of the fact that the appellant did not have a fixed address and the gravity of the offence the appellant is not a suitable candidate for correctional supervision in terms of s276.

[10] It was pointed out to Bruwer that the appellant had informed the other probation officer that he pleaded guilty and tried to stop the assault on the deceased. It was however pointed out to her that the accepted evidence contradicts the appellant's allegations in that regard. Bruwer held the view the appellant's

false allegation of his alleged role and his persistent denial of his is not reflective of the presence of remorse as he does not own up.

[11] Bruwer conceded that alcohol; drug substance and dagga abuse coupled with the fact that they were a group played a roll in the commission of the offence. She further opined that a ten months imprisonment may be considered in stead of the maximum five years sentence in terms of s276(1)(i).

[12] Bruwer also pointed out that the appellant came from a battered family where alcohol, arguments and assaults were the order of the day since his childhood.

[13] As stated earlier the trial Court sentenced the appellant and accused 2 each to fifteen years imprisonment. Accused 3 at that stage was at large and a warrant for his arrest had already been issued. He was however later sentenced to 15 years imprisonment as well.

[14] It was submitted on behalf of the appellant that the Trial Court did not properly follow the principles stated in S v Pietersen (*supra*), although the report was obtained. In the probation officer's report non-custodial sentence was recommended. It has also been further submitted that the Trial Court erred in not tempering with the sentence of the appellant as he was a youth. as advocated in *S v N*[4] the Supreme Court of Appeal said: "So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered."

[15] It was further submitted that the sentence imposed by the Trial Court is excessive. In this regard it is submitted that in *S v Salzwedel (supra),* also a racially motivated murder case committed by white youths who had decidedly gone out with the singular purpose of assaulting their victims on the basis of the colour of their skin, were sentenced to 12 years imprisonment 2 years of which were suspended. The appellants in that case

[4] 2008 (2) SACR 135 (SCA) at 147h-I.

armed with weapons had decidedly gone out with the singular purpose of assaulting their victims on the basis of the colour of their skin. It was further submitted that *in casu* the appellants had not premeditated the assault and did not have weapons, unlike in the *Salzwedel* case, but was instantaneous and therefore a lighter sentence should have been imposed. It is further submitted that there should have been differentiation of the sentence because the appellant played an insignificant role in the assault of the deceased as that of accused 2.

[16] In *S v Pietersen(supra)* it was emphasised that where dealing with the sentencing of youth offenders, a probation report regarding the background of the youth must be obtained. *In casu*, the Trial Court caused the probation officer's report to be obtained and considered it.

[17] It is trite that sentencing is a matter of the discretion of the court. The recommendation by the probation officer regarding sentence do not bind the court. The court need not follow such

recommendation. The court must evaluate such recommendation and exercise its discretion as to what is an appropriate sentence.

[18] In *Salzwedel* matter *(supra)* it was found that the young white accused were motivated by racial bigotry when they killed the deceased. The psychologist who interviewed them recommended non-custodial sentence. The Supreme Court of Appeal held that:

(a) the app a psychologist:

(b) focusing on the well-being of the accused would result in warped sentences;

(c) racism conditioned by racist environment is not necessarily mitigating factor (my view is that it should be regarded as an aggravating factor);

(d) sentence is to give expression to legitimate feelings of outrage experienced by reasonable men and women upon commission of serious racist crime.

[19] In my view, the Trial Court carefully considered the gravity of the crime committed by the appellant and his socio in crime. The fact that the Trial Court did not heed the recommendation of the probation officer and imposed in the exercise of his discretion a custodial sentence does not vitiate the sentence. In Salzwedel[5] matter (the late Mahomed CJ said: "An Appeal court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is 'disturbingly inappropriate', or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably".

[20] The severity and brutality of the assault on the deceased is reflected on photos 7and 8 which were handed in as exhibit C. Photo 7 shows the blooded face of the deceased with hugely swollen upper lip, almost reaching his blooded nose, closed swollen and blue left eye. His right hand seems to have cut injuries and is visibly swollen. Photo 8 shows the bruised and

[5] *supra)* at 591g.

blooded face of the deceased from the right side. This brutality of the killing cannot be looked at in isolation.

[21] It was contended on behalf of the appellant that because the appellant and his *socio in crime* had abused liquor and drugs and dagga the Trial Court failed to sufficiently take this into consideration. Assuming that the use of these substances is proffered as tempering with the blameworthiness of the appellant, and therefore amounts to mitigating circumstances, it needs be pointed out that the appellant bears the *onus* of proving the extent these substances afflicted his sobriety. In this regard *vide S v Qeqe and Another*[6]. There was no evidence proffered by the appellant to prove what influence the substances had on him. It is within the Trial Court to decide what weight to attach to presence or otherwise of liquor and the other substance. I am of the view that the Trial Court did take this factor into consideration.

[6] 1990 (2) SACR 654 (CkA).

[22] The gravity of the offence committed by the appellant and his *socio in crime* does not lie only in the killing of an innocent person, and or the severity and the brutality of the commission thereof but more in the motive which propelled them to commit it, racism! Racially motivated offences committed by whoever offend against the ethos and aspirations of the peoples of this nascent democracy. The evil in racism is that it has the potential of plunging this country into the abysses of pre1994 and opens the healing wounds of the past and further divides the citizenry on racial lines.[7]

[23] It is apposite to once more cite in full the late Mahomed AJA (as he then was) in S v Van Wyk[8]:

> "Mr. Botes repeatedly contended that because the appellant was 'socialized' or conditioned by a racist environment for many years, the fact that murder of the deceased was racially motivated should in the circumstances be treated as a mitigating factor and not as an aggravating factor. He accordingly contended that the Court *a quo* had erred in 'finding that... the racial undertone must be seen as an aggravating factor".

[7] Vide Preamble of the Constitution of the Republic of South Africa, Act 108 of 1996.
[8] 1992 (1) SACR 147 (Nm) at 172f-173g.

This submission raises an important issue pertaining to sentencing policy in post-independence Namibia. Crucial to the identification of that policy is the spirit and the tenor of the Namibian Constitution.

As I have previously said:

'The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

(S v Acheson 1991 (2) SA 805 (Nm) at 813A-B.)

Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread – an abiding 'revulsion' of racism and apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and to protect the gains of our long struggle' against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity. (See the Preamble of the Constitution and arts 10 and 23.)

That ethos must 'preside and permeate the processes of judicial interpretation and discretion' as much in the area of criminal sentencing as in other areas of law.

To state that the appellant's racism was conditioned by a racist environment is to explain but not necessarily to mitigate. At different times in history, societies have sought to condition citizens to legitimise discrimination against retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. That time for the Namibian nation arrived with its independence. The commitment to build a new nation was then articulated for everybody inside and outside Namibia to understand, to cherish, to share and to further *(sic)*. The appellant must, like other citizens, have been exposed to the force and the significance of this message.

To allow the 'racist socialisation' of pre-independence Namibia to continue to operate as a mitigating circumstance, after the new Constitution has been publicly adopted, widely disseminated and vigorously debated both in Namibia and the international community, would substantially be to subvert the objectives of the Constitution, to impair the process of national reconciliation and nation building and to retard the speed with which Namibian society has to recover from the legacy of its colonial past.

Having regard to the foregoing, I can find no fault with the finding of the Court *a quo* that the racial motive which influenced the appellant to commit a serious crime must in the circumstances of the case be considered as an aggravating factor. The sentence imposed should and did, in my view, correctly reflect the determination of the Courts to give effect to the constitutional values of the nation and to project a strong message that such criminal manifestations of racism will not be tolerated by the Courts of the new Namibia."

[24] I find the views expressed in the aforesaid passage to be apposite in the circumstances of this case. I am further of the view that racist bigotry should not be tolerated regardless of the age of the perpetrator. With regard to the youth, because they are the future of this country, the Courts must not hesitate to impose long sentences to ensure that this evil is not carried into the future.

[25] In *S v N*[9] the Supreme Court of Appeal with regard to sentencing of a youthful offender said: "So if there is a

[9] 2008 (2) SACR 135 (SCA) at 147h-I.

legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered." It is contended on behalf of the appellant that the Trial Court erred in not tempering with the duration of the custodial sentence it decided to impose.

[26] In casu, the Trial Court had regard to the fact that there was no remorse evinced by the appellant. The Trial Court in the circumstances held the view that an appropriate sentence was custodial sentence. I am of the view that the Trial Court cannot be faulted in that regard.

[27] Sentencing requires the balancing of all the circumstances and interest not only of the offender but also the collective populace. I*n casu* the Trial Court had regard to the fact that there was no remorse evinced on the part of the appellant, and expressed itself that otherwise would have mitigated the duration of the sentence. I am of the considered view that in the circumstances of this case the youthfulness of the appellant does not per se

qualify him to a lesser sentence than the one imposed, particularly if such sentence has been arrived at through sound reasoning. I am of the view that the Trial Court did not close its eye to the youthfulness of the appellant.

[28] It has further been submitted that the sentence is shockingly inappropriate when compared to sentences imposed in similar cases by the Supreme Court of Appeal in *S v Salzwedel (supra)*. In the case of *Salzwedel* the murder was committed on 12 March 1994. During that period there was tension in the country, with some of the sectors of the citizenry uncertain of their future in the new democracy. There were those who wanted to destabilize the process of transformation through racist attacks with the hope that the country would be plunged into a full scale civil war. After 27 April 1996, the path charted was one of reconciliation. It is understandable that for those few years post 1996 there would be some pockets of hangover to the past. The sentences imposed by the Supreme Court of Appeal in the matters cited herein must be understood in the

context of the hangover syndrome. I am of the view that the further away we move from 1996, there is a need to deepen and strengthen the ethos of the Constitution. There is equally a duty on the courts to impose harsher sentences in racially motivated crimes because there is no room for racist bigotry in this democracy. There is no need to be sympathetic to those who are fixed in the past when the majority of the peoples of this country are forging ahead with reconciliation. *In casu* the crime was committed 7 (seven) years into the democracy. There was no need for the commission of this offence and it warrants that sever sentences should be imposed. I find the sentence imposed in the circumstances not shockingly inappropriate.

[29] It has further been contended that the appellant only fell the deceased with one blow and his role was minimal there should be differentiation of his sentence from the other co-accused. The Trial Court found that the appellant was furthering a common purpose when he assaulted the deceased. The death

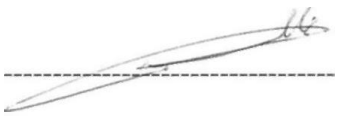
of the deceased, in my view, was as the result of the cumulative effects of the collective assault by the appellant and his mates. It would be nay impossible to quantify the blows rendered by each of the three assailants and then apportion such individual's blows into compartments to determine and differentiate their respective contribution to the death of the deceased for purposes appropriating commensurate sentences on different degrees. The purpose of the sentence in the circumstances of this case is to deal with and eradicate the evil that dwells in each and every one of them[10]. Towards that end there is no need to mete different sentences.

[30] In conclusion, I find that the sentence imposed is not shockingly inappropriate and serves the desert of the appellant. I also find that the Trial Court properly met the principles flowing from

[10] In Salzwedel (supra) at 595h-I Mahomed CJ said: "Although the different respondents had different duties to discharge in the events which led to the murder of the deceased, and although only two of the respondents were directly involved in his assault, the trial Court was correct in treating them all equally for the purposes of sentence. All the respondents acted together and in concert, and the acts of each, in the circumstances of this case, must be attributed to the others. Nor is there any reason to treat the fourth respondent differently because he did not participate in the previous raids of the group when they attacked black persons. He took part in the events on the night in question with the knowledge and appreciation of what had gone before."

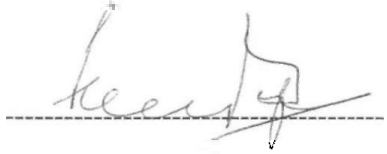
Petersen matter *(supra)* and did not err in assessing and reaching in the exercise of his discretion the sentence imposed.

[31] In the result the appeal against sentence is dismissed and the sentence of 15 years imprisonment imposed by the Trial Court on 17 May 2004 is confirmed.



N.M. MAVUNDLA
JUDGE OF THE HIGH COURT

I agree.



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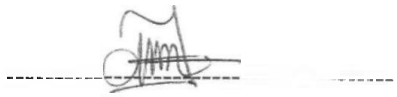
ACTING JUDGE OF THE HIGH COURT



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ACTING JUDGE OF THE HIGH COURT